SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 655

DORIS SYLVIA GREY, infant, and HOWARD MARTIN GREY, infant, children of Harry M. Goldberg, deceased, and Sophie Goldberg, deceased, by ESTHER WEINER, their guardian *ad litem*,

Petitioners,

—against—

AMERICAN AIRLINES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioners, plaintiffs below,* seek a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, affirming a judgment of the Unitel States District Court for the Southern District of New York entered upon the District Court's order, dated March 3rd, 1955, setting

* The plaintiffs, Howard Martin Grey and Doris Sylvia Grey, children of the said Harry M Goldberg and Sophie Goldberg, were 22 and 25 years of age, respectively, at the time of the trial but were infants of 17 years and 3 months, and 20 years and 3 months, respectively, at the tine of their parents' deaths.

aside verdicts in favor of plaintiffs and directing judgment in favor of plaintiffs in the amount of $16,600 only. The action resulted from the deaths of petitioners' parents, who were passengers on an international flight on one of respondent's DC-6 airplanes which crashed at Love Field, Dallas, Texas, on November 29, 1949.

The opinion of the District Court, dated December 21, 1950, which denied petitioners' motion for summary judgment directed to the sufficiency of respondent's affirmative defenses based upon the Warsaw Convention, is reported in 95 F. Supp. 756. However, neither that opinion nor the papers, affidavits and exhibits upon which it is based, are printed in the record or in petitioners' appendix to their petition. The opinion of the District Court granting respondent's motion for judgment notwithstanding the verdict, and in the alternative for a new trial, is not officially reported but is printed both in the record (R. 6a-33a) and in the appendix to the petition (Pet. 32-57).* The unanimous opinion of the Court of Appeals, affirming the judgment and order of the District Court is reported in 227 F. 2d 282, and is also printed in the appendix to the petition (Pet. 25-31).

Upon the trial of the action, the jury returned a verdict in favor of petitioners in the amount of $80,000 for the death of their father and $10,000 for the death of their mother. Respondent immediately moved, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, to set aside the verdict and for a direction dismissing the complaint for all amounts in

* In this brief, references including the prefix "R" apply to pages in the printed appendix record filed by petitioners; references including the prefix "Pet." apply to pages in the appendix to the petition.

excess of $8300 for the death of each decedent and, in the alternative, for a new trial upon the ground that the verdict was contrary to the evidence and contrary to the law, and upon the further ground that the verdict was excessive insofar as it exceeded the sum of $8300 for the death of each decedent. This motion was based upon the fact that the transportation on which decedents lost their lives was international transportation by air as defined by the Warsaw Convention and that in the absence of proof of wilful misconduct under Article 25 thereof, recovery was limited by the provisons of Article 22 of said Convention.*

The Trial Court granted respondent's motion, set aside the verdict and directed judgment for petitioners in the limited amounts provided under the terms of the Warsaw Convention, stating (Pet. 52):

> "* * *, I am convinced that plaintiffs have not made out a case on the theory that the accident was caused by the wilful misconduct of defendant and its employees. In coming to this conclusion I am not passing on any disputed version of any of the witnesses; I am not passing on the credibility of the story told by one witness as against that told by another. I am viewing the evidence with all inferences favorable to plaintiffs and considering all the evidence most favorable to plaintiffs' theory and claim in this respect. In so doing, I am strongly convinced that from all such evidence the jury was not justified in bringing in a verdict which by its very terms was a finding that this accident, which resulted in the death of Mr. and Mrs. Grey, was caused and brought about by the

* 49 Stat. Pt. 2, p. 3000 *et seq.*

wilful misconduct of defendant, its agents and servants, as defined by me in my charge to the jury, to which no exception was taken" (R. 28a; Pet. 52).

In unanimously affirming the action of the District Court, the Court of Appeals per Medina, *J.* stated, *inter alia,* that "we cannot discover anything in the case to warrant a finding of wilful misconduct", and further that "the record is still devoid of any evidence of wilful misconduct" (Pet. 31).

ARGUMENT

In opposing the present petition for certiorari, respondent respectfully urges the following points:

1. This Court has heretofore declined to review similar final judgments in actions for wrongful death limiting the amount of recovery under the Warsaw Convention.

2. No conflict of decisions and no important question of federal law is involved.

3. In any event the decisions of the District Court and the Court of Appeals were clearly correct.

POINT I

This Court has heretofore declined to review similar final judgments in actions for wrongful death limiting the amount of recovery under the Warsaw Convention.

In prior wrongful death cases involving the Warsaw Convention, this Court has declined to review final judgments limiting recoveries thereunder in the absence of pleading or proof of wilful misconduct.

> *Wyman* v. *Pan American Airways, Inc.*, 181 Misc. 963, 267 App. Div. 947, 293 N. Y. 878, cert. den. 324 U. S. 882;
>
> *Garcia* v. *Pan American Airways, Inc.*, 183 Misc. 258, 269 App. Div. 287, 295 N. Y. 852, cert. den. 329 U. S. 741; 274 App. Div. 996, cert. den. 338 U. S. 824;
>
> *Lee* v. *Pan American Airways, Inc.*, 275 App. Div. 855, leave to appeal den. 275 App. Div. 962 and 300 N. Y. 761, cert. den. 339 U. S. 920;
>
> *Goepp* v. *American Overseas Airlines, Inc.*, 281 App. Div. 105, 305 N. Y. 830, cert. den. 346 U. S. 474.

The same has been true with respect to judgments limiting recoveries in personal injury cases.

> *Ross* v. *Pan American Airways, Inc.*, 299 N. Y. 38, cert. den. sub nom. *Froman* v. *Pan American Airways, Inc.*, 349 U. S. 947.

In the *Wyman* case, petitioners were the executors of a passenger who lost his life when the airplane on

which he was traveling disappeared between Guam and Manila. At the close of the plaintiffs' case defendant rested without introducing any proof and then moved for a directed verdict in plaintiffs' favor in the sum of $8300. The Court granted defendant's motion and directed the jury to bring in a verdict for plaintiffs in the sum of $8300. Later the Court denied plaintiffs' motion to set aside the verdict as inadequate, stating (181 Misc., at p. 965):

> "The Warsaw Convention rules are applicable only to international flights (art. 1) and raise a presumption of liability on the part of the carrier for injury or death to a passenger (arts. 17, 20) limited to 125,000 francs or approximately $8,300 under the rate of exchange fixed (art. 22) except where the carrier is guilty of 'wilful misconduct' (art. 25).
>
> There was no proof in this case of 'wilful misconduct' on the part of defendants (*Wass* v. *Stephens,* 128 N. Y. 123; *Brown* v. *Garey,* 267 N. Y. 167), and, indeed, no proof of any negligence connected with, or as a proximate cause of, the accident. (*Kilinowski* v. *Ryerson & Son, Inc.,* 242 App. Div. 43, affd. 270 N. Y. 532.) Nor, in view of the circumstances, were defendants able to offer any proof in rebuttal of the presumption of liability (art. 20).
>
> The case at bar would thus seem to be within the very situation embraced by the rules of the Warsaw Convention which here operate to permit a recovery that otherwise might be impossible for want of proof. On these considerations, at the conclusion of the trial, a verdict was directed for plaintiffs in the sum of $8,300, in accordance with the rules stated."

The judgment entered in the foregoing case was unanimously affirmed without opinion by both the Appellate Division, 267 App. Div. 947, and the Court of Appeals, 293 N. Y. 878, and this Court denied certiorari, 324 U. S. 882.

In both the *Garcia* and *Lee* cases, *supra,* petitioners' decedents had been international passengers who lost their lives in the crash of an airplane near Lisbon, Portugal. Similar to the present action, neither complaint alleged that the accident was caused by wilful misconduct on the part of defendant or facts amounting thereto, and defendant's defenses, pleading the Warsaw Convention, were substantially similar to the defenses pleaded in the case at bar. In both cases, plaintiffs moved to dismiss these defenses on the ground that they were insufficient in law. In the *Garcia* case, the motion was denied and the constitutionality of the Convention was expressly upheld, 183 Misc. 258, affirmed 269 App. Div. 287, affirmed (no opinion) 295 N. Y. 852, certiorari denied, 329 U. S. 741. Subsequently, defendant moved for summary judgment in favor of plaintiffs for the limited sum of $8300. This motion was granted and the judgment entered thereon was affirmed by the Appellate Division, 274 App. Div. 996. The Court of Appeals denied leave to appeal from the final judgment (not reported) and this Court again denied certiorari, 338 U. S. 824. In the *Lee* case, the motion to strike the defenses of the Warsaw Convention was denied, and defendant's subsequent motion for judgment on the pleadings in favor of plaintiffs in the sum of $8300 was granted. Both of these orders and the judgment were unanimously affirmed by the Appellate Division, 275 App. Div. 855. Plaintiff's motions for leave

to appeal were denied by both the Appellate Division, 275 App. Div. 962, and the Court of Appeals, 300 N. Y. 761, and this Court denied certiorari, 339 U. S. 920.

Goepp v. *American Overseas Airlines, Inc., supra,* is in many respects remarkably similar to the case at bar. In that case, a New York Supreme Court jury returned a verdict in excess of defendant's limited liability and defendant immediately moved to set aside the verdict and for a direction dismissing the complaint for all amounts in excess of $8300, and in the alternative for a new trial. The Trial Court, although expressing grave doubts as to the sufficiency of the evidence to take the case to the jury, refused to disturb the jury's verdict and defendant appealed. In reducing the verdict from $65,000 to $8300, the Appellate Division, First Department stated (281 App. Div. 105, 107):

> "Plaintiff charged that the defendant had violated certain safety regulations of the United States Civil Aeronautics Board. A jury to whom the case was submitted found the defendant carrier guilty of wilful misconduct in that it had violated the regulations as claimed by plaintiff. Damages were awarded to plaintiff in the amount of $65,000, as a corollary to a finding of violation of the regulations constituting wilful misconduct.
>
> Defendant upon this appeal does not question plaintiff's right to recover $8,300 under the Warsaw Convention. It does contest the judgment and verdict insofar as a sum in excess of $8,300 is awarded. * * *

* * * *

* * * Wilful misconduct, as the trial court correctly charged, depends upon the facts of a particular case, but in order that an act may be characterized as wilful there must be on the part of the person or persons sought to be charged, a conscious intent to do or to omit doing the act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct. The burden of establishing wilful misconduct rests upon plaintiff. (*Ulen* v. *American Air Lines,* [1948] U. S. Av. Rep. 161, affd. *sub nom. American Airlines* v. *Ulen,* 186 F. 2d 529, 533; *Ritts* v. *American Overseas Airlines,* [1949] U. S. Av. Rep. 65; *Pekelis* v. *Transcontinental & Western Air,* [1950] U. S. Av. Rep. 296, revd. on other grounds 187 F. 2d 122, certiorari denied 341 U. S. 951; 65 C. J. S., Negligence, § 9.)

* * * *

Upon the record in this case, there was no evidence submitted to show that asserted violations of air safety regulations were the proximate cause of the accident, or that defendant was guilty of any wilful misconduct within the purview of the provisions of the Warsaw Convention. The trial court should have granted defendant's motion to dismiss plaintiff's complaint insofar as there was any claim of liability in excess of $8,300."

On appeal to the Court of Appeals, the judgment entered upon the Appellate Division's order reducing the aforesaid verdict was unanimously affirmed, 305 N. Y.

830, and this Court denied certiorari, 346 U. S. 474. In the *Goepp* case, the petitioner argued unsuccessfully that a submissible case for the jury on the issue of wilful misconduct had been presented and that the Appellate Court had substituted its findings, deductions and conclusions from the evidence on the issue of wilful misconduct for the verdict reached by the jury and had thus deprived petitioner of a jury trial by directing a contrary verdict. It will be noted that in the case at bar, petitioners' principal argument under the headings of "Questions Presented" and "Reasons For Granting Writ" are strikingly similar to the argument which failed to move this Court to exercise its certiorari jurisdiction in the *Goepp* case.

POINT II

No conflict of decisions and no important question of federal law is involved.

No novel or important question of general application is involved in this case. Substantially all that is involved is whether, on the record in this case, petitioners presented a submissible case for the jury on the issue of wilful misconduct. The District Court and the Court of Appeals, applying well-established rules of law, held that they did not. None of the cases cited by petitioners is in conflict with the decisions and judgment in the case at bar. Certainly the language quoted from *Tennant* v. *Peoria & Pekin Union R. Co.,* 321 U. S. 29, at pages 8 and 9 of the petition, and the language from *Lavender* v. *Kurn,* 327 U. S. 645, quoted at pages 9 and 10 of the peti-

tion, is not in conflict with the Court of Appeals statement in the present case (Pet. 29):

> "Moreover, as this is a jury case, plaintiffs are entitled to have the evidence viewed in the light most favorable to plaintiffs. All questions of credibility were for the jury. It was within their province to pick and choose, to accept a part or the whole of the testimony of any particular witness, and to reject the rest. Where conflicting inferences were rationally admissible, it was a function of the jury to take those which they considered most consistent with the general pattern of the proofs. And this congeries is summed up in the general verdicts. The trial judge had a right to reject the finding of wilful misconduct only if, on no possible view of the evidence, could reasonable men reach that conclusion. *Binder* v. *Commercial Travelers,* 165 F. 2d 896 (2 Cir. 1948); 3 Moore, Federal Practice § 50.01 (1938)."

The above statement clearly refutes the rash and false argument at pages 16 and 17 of the petition that "The Courts below erroneously bound the jury to accept a so-called uncontroverted explanation of a discredited interested witness." That the Court of Appeals decision in the case at bar is perfectly consistent with the cases cited by petitioners is further emphasized by the following statement in its decision (Pet. 31):

> "True it is that the jury were entitled to disregard the testimony of the First Officer, or any part of it, and to accept the testimony of the Captain in its entirety. But even so the record

is still devoid of any evidence of wilful misconduct."

In petitioners' "Point III" they infer that the Convention is not applicable because the passenger tickets did not set forth the agreed stopping places. They fail to advise this Court that their motion in the District Court raising this issue was denied by District Judge Noonan on December 21, 1950, in a scholarly opinion reported in 95 F. Supp. 756, wherein he considered and rejected the arguments raised by petitioners with respect to this point. They not only have failed to print Judge Noonan's opinion in the record in this case but also they have failed to print or refer to the affidavits and exhibits upon which Judge Noonan based his decision in part, at least. Petitioners cite no authority whatsoever for their wholly untenable argument that the respondent's failure to list the "agreed stopping places" on the tickets issued and delivered to their decedents deprived respondent of the limitation of liability provisions of the Warsaw Convention. It is respectfully submitted that Judge Medina amply disposed of petitioners' oblique reference to this point in the Court below when he said (Pet. 26):

> "While plaintiffs contended that the Warsaw Convention was not applicable, because the passenger tickets issued to decedents did not make reference to the intermediate 'agreed stopping places' of Washington, D. C., and Dallas, Texas, motions to strike the usual Warsaw Convention limitation of liability defenses, based upon this technical and wholly unsubstantial alleged omission, were denied before trial by Judge Noonan.

> We agree with Judge Noonan's reasoning and see no occasion to elaborate upon his carefully prepared opinion. *Grey* v. *American Airlines,* 95 F. Supp. 756 (S. D. N. Y. 1950)."

Point IV under the alleged "Reasons For Granting Writ" is so palpably insufficient in both law and fact as not to require extended comment. Suffice it to say that the amount of the verdict, while of concern and importance to the immediate parties hereto, can hardly be deemed a matter falling within the scope of Rule 19(b) of this Court's rules.

In addition to the fact that the awards were properly limited to $8300 for the death of each of plaintiffs' decedents in the absence of proof of wilful misconduct, Judge Conger correctly ruled on the alternative branch of defendant's motion to set aside the jury's verdicts in that part of his opinion which is printed at pages 53 to 57 of the petition. Petitioners advance no logical answer to Judge Conger's analysis of why these verdicts were excessive.

POINT III

In any event the decisions of the District Court and the Court of Appeals were clearly correct.

The lack of any evidence of wilful misconduct on the part of respondent or its employees is readily demonstrated upon examination of the record. The evidence established, and it was undisputed, that petitioners' decedents were passengers on a DC-6 airplane, owned, operated, maintained and controlled by respondent; that the airplane, operating as Flight 157, crashed at Love Field, Dallas, Texas, on the morning of November 29, 1949, and that petitioners' decedents lost their lives in the crash. It was also undisputed that the flight crew, captain, first officer and engineer, had checked the airplane log book and performed all of their various pre-departure duties at La Guardia Field prior to taking off on the evening of November 28, 1949. The take-off, climb and flight from La Guardia to Washington were described by all three crew members as routine, as were the take-off, climb and flight out of Washington. All three crew members testified that the airplane was airworthy on both of these take-offs. Prior to reaching Nashville, Tennessee, the aircraft passed through a storm or frontal condition, concerning which the crew had been briefed prior to departure and shortly before reaching Nashville the flight broke out into the clear.

In the vicinity of Nashville, the number 1 engine backfired, and although remedial measures were attempted to correct this condition, the back-firing persisted and the propeller of that engine was therefore

feathered approximately twenty-five miles west of Nashville. The flight continued on to Dallas on three engines with no appreciable loss in airspeed and carrying just a slight amount of rudder trim to compensate for the feathered engine. In the vicinity of Altheimer, Arkansas, the flight contacted the company radio station at Forth Worth and suggested a change of equipment upon arrival at Dallas so that the passengers who were going on to Mexico City would not be delayed while the number 1 engine was being checked by ground maintenance. In the vicinity of Garland, Texas, approximately fifteen miles northeast of Dallas, the pre-landing check list was accomplished, and at that time the flght engineer noticed that the number 4 main fuel tank, which was feeding the number 4 engine, contained approximately 500 pounds of fuel, or more than enough to reach Dallas and land.

As the flight neared Love Field, Dallas, the wing flaps were partially extended and a right turn was made to aline the plane for a landing on runway 36, the north-south runway. Both the captain and the first officer testified that the right turn was too wide and that upon completion of the turn the airplane was to the left of and not lined up with the runway. According to the captain, he corrected his position, following which the landing gear was lowered and full flaps were extended. According to the first officer, the captain attempted to correct his position, but the airplane drifted further to the left, and during this time the gear was lowered and full flaps were extended.

The plane continued on to the airport, and at some point, either while crossing the road near the airport boundary, as stated by the captain, or approximately

a half mile back, as stated by the first officer, the flight engineer noticed that the fuel flow on the number 4 engine had dropped to zero and called out that that engine was cutting out. The captain ordered the booster pump applied, and the engineer complied with this order by turning on the number 4 booster pump. According to the testimony of the captain, the number 4 engine surged back in, the left wing went down and the airplane yawed or turned to the left. He stated that he got the left wing up, applied full power on engines 2, 3 and 4, called for the landing gear and flaps to be retracted and attempted to climb out for a new landing approach, when the airplane stalled and hit a hangar on the west side of the airport.

The first officer testified that he did not hear any order to raise the gear and the flaps, but knew from the actions of the captain that the latter was attempting to pull up and go around. He raised the landing gear, but because of the low altitude and slow airspeed he did not retract the flaps, fearing that if he did so at that time it would cause the airplane to stall and settle immediately. At the same time he noted from five different instruments on his instrument panel that the number 4 engine was not developing power, but was windmilling. This would cause increased drag on the airplane. He therefore feathered the number 4 engine's propeller to reduce the drag and enable the plane to climb out, if possible. He did not advise the captain that he was feathering because there was insufficient time. He thought that the captain had seen him push the feathering button. After feathering the number 4 engine, the first officer attempted to tell the control tower at the airport

that the engine had been feathered and that they were losing the airplane. The impact of the plane hitting the hangar cut off this transmission.

This then was the evidence on the issue of liability. It was petitioners' burden to prove that the deaths of their decedents were caused by an intentional act performed with the realization of the probability of injury from the conduct and a disregard of the probable consequences of such conduct (*Goepp* v. *American Overseas Airlines, supra,* and cases cited therein). Viewing the evidence and all admissible inferences therefrom in the light most favorable to petitioners, as both the District Court (Pet. 52) and the Court of Appeals (Pet. 29) scrupulously did, the record is barren of sufficient evidence to constitute a submissible case for the jury on the issue of wilful misconduct.*

Petitioners' main argument proceeds on the false premise that rejection of the first officer's explanation of his actions or disbelief of his testimony furnishes a basis for a finding of wilful misconduct on his part. However, as this Court has pointed out in *Moore* v. *Chesapeake & O. R. Co.,* 340 U. S. 573, 576, disbelief of the first officer's testimony would not supply a want of proof. Both the District Court and the Court of Appeals, whose duty it was to scrutinize the record to determine if a submissible case had been made out,

* Throughout their petition, petitioners make some fantastic claims of what they "proved at the trial". They reach the height of absurd inaccuracy and disregard of the record in their list of twelve enumerated items on pages 14 and 15 of their petition. This list consists of fanciful and partisan contentions.
The captain did not testify at the trial as erroneously stated at page 3 of the petition. His deposition, taken by plaintiffs long after his employment by defendant had terminated, was read in part into the record during the trial.

recognized and met the fallacy in petitioners' argument. Thus, the District Court stated (Pet. 52):

> "The jury may have chosen to disregard [First Officer] Lewis' opinion but if it did there was no evidence upon which to base a contrary judgment."

and the Court of Appeals, in affirming unanimously, stated (Pet. 31):

> "True it is that the jury were entitled to disregard the testimony of the First Officer, or any part of it, and to accept the testimony of the Captain in its entirety. But even so the record is still devoid of any evidence of wilful misconduct."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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